

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

JOHN DOE 1, et al.,

Plaintiffs,

v.

UNIVERSITY OF SAN FRANCISCO, et  
al.,

Defendants.

Case No. 22-cv-01559-LB

**ORDER DENYING MOTION TO  
CERTIFY ISSUE CLASS**

Re: ECF No. 266

**INTRODUCTION**

The plaintiffs in this putative class action are former University of San Francisco Division I baseball players who sued their coaches (for allegedly creating a sexualized environment and punishing players who did not participate) and USF (for not stopping it). They claim discrimination, retaliation, negligence, breach of contract, and infliction of emotional distress.

The plaintiffs moved for class certification under Fed. R. Civ. P. 23(a), (b), and (c)(4) on issues arising from their discrimination, retaliation, and negligence claims. The motion is denied because the plaintiffs have not proven that the proposed class satisfies the commonality requirement.

**STATEMENT**

The named plaintiffs are thirteen former USF baseball players. They allege that coaches Anthony Giarratano and Troy Nakamura engaged in abusive, bullying, offensive behavior for

decades that was sexualized and directed against the plaintiffs because of their gender. When the plaintiffs did not participate in the behavior, the coaches insulted and punished them. As a result, the plaintiffs suffered anxiety, depression, and other psychological harm. Players left the team in droves and parents complained. USF allegedly engaged in a coverup because it did not address the parents' complaints, which, according to the plaintiffs, violated Title IX and constituted negligent supervision.<sup>1</sup>

The plaintiffs propose a class defined as “[a]ll members of the University of San Francisco baseball team since 2000.”<sup>2</sup> The class would apply to the plaintiffs' discrimination, retaliation, and negligence claims, and be further limited to certain issues pursuant to Rule 23(c)(4).

### 1. Discrimination Issues

The proposed class would be limited to issues related to liability under the plaintiffs' pre- and post-assault discrimination theories. The issues would not include causation or damages. The plaintiffs contend that questions common to the class for its pre-assault theory are (1) whether USF had a policy of deliberate indifference to reports of sexual misconduct, (2) whether this indifference created a heightened risk of sexual harassment in a context subject to USF's control, and (3) whether the class suffered severe, pervasive, and objectively offensive harassment.<sup>3</sup> The post-assault common questions are (4) whether USF had substantial control over the coaches, (5) whether the coaches' harassment was severe, pervasive, and objectively offensive, (6) whether any USF officials knew of the harassment, (7) whether USF acted with deliberate indifference to the harassment, and (8) whether USF's indifference made the class vulnerable to harassment.<sup>4</sup>

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<sup>1</sup> Third Am. Compl. – ECF No. 133 at 6–94 (¶¶ 45–482). Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

<sup>2</sup> Mot. – ECF No. 266 at 8.

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Id.* at 22–23.

**2. Retaliation Issues**

The proposed class would be limited to issues related to liability for the retaliation claim. The plaintiffs argue that questions common to the class are (9) whether members of the USF baseball team engaged in protected activity and (10) whether that activity was met with retaliation that resulted in a broader deterrent effect within the USF baseball team.<sup>5</sup>

**3. Negligence Issues**

The proposed class would be limited to issues relating to liability under the plaintiffs' claims for negligent supervision, negligence, and gross negligence. The proposed issues would not include causation or damages. The plaintiffs contend that questions common to the class are (11) whether a special relationship exists between USF and the USF baseball players or the coaches and the coaches and the USF baseball players, (12) whether abuse by the coaches was foreseeable to USF, or abuse by Nakamura foreseeable to Giarratano, (13) whether recognizing a duty as to USF or the coaches is consistent with public policy, (14) whether USF was on notice of the risks posed by the coaches, or Giarratano on notice of the risks posed by Nakamura, (15) whether USF failed to take reasonable steps with respect to the coaches, or Giarratano with respect to Nakamura, including by not terminating or adequately supervising, (16) whether the coaches' conduct arose out of their employment, and (17) whether, as head coach, Giarratano was responsible for the conduct of his subordinates.<sup>6</sup>

**LEGAL STANDARD**

Class actions are governed by Federal Rule of Civil Procedure 23. A party seeking to certify a class must show that all the prerequisites of Rule 23(a) are met, as well as those of at least one subsection of Rule 23(b).

The prerequisites of Rule 23(a) are (1) the class is so numerous that joinder of all members is

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<sup>5</sup> *Id.* at 25.

<sup>6</sup> *Id.* at 27.

1 impracticable, (2) there are questions of law or fact common to the class, (3) the claims or  
2 defenses of the representative parties are typical of the claims or defenses of the class, and (4) the  
3 representative parties will fairly and adequately protect the interests of the class.

4 A court may certify a class under Rule 23(b)(3) if “the court finds that the questions of law or  
5 fact common to class members predominate over any questions affecting only individual  
6 members, and that a class action is superior to other available methods for fairly and efficiently  
7 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

8 A class can be created to resolve an entire action or particular issues. Fed. R. Civ. P. 23(c)(4)  
9 (“When appropriate, an action may be brought or maintained as a class action with respect to  
10 particular issues.”). An issues class need not satisfy the predominance requirement of Rule  
11 23(b)(3). *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Even if the  
12 common questions do not predominate over the individual questions so that class certification of  
13 the entire action is warranted, Rule 23(c)(4) authorizes the district court in appropriate cases to  
14 isolate the common issues . . . and proceed with class treatment of these particular issues.” The  
15 class must, however, satisfy all requirements of Rule 23(a) and one subsection of Rule 23(b), and  
16 materially advance the litigation. *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D.  
17 630, 633 (N.D. Cal. 2015).

18 “[P]laintiffs wishing to proceed through a class action must actually prove — not simply plead  
19 — that their proposed class satisfies each requirement of Rule 23, including (if applicable) the  
20 predominance requirement of Rule 23(b)(3).” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573  
21 U.S. 258, 275 (2014) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011));  
22 *Comcast Corp. v. Behrend*, 569 U.S. 27, 32–33 (2013)). “[C]ertification is proper only if the trial  
23 court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied.”  
24 *Comcast*, 569 U.S. at 33 (cleaned up). “Such an analysis will frequently entail overlap with the  
25 merits of the plaintiff’s underlying claim.” *Id.* at 33–34 (cleaned up). “That is so because the class  
26 determination generally involves considerations that are enmeshed in the factual and legal issues  
27 comprising the plaintiff’s cause of action.” *Id.* at 34 (cleaned up). Still, “Rule 23 grants courts no  
28 license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn.*

*Ret. Plans and Tr. Funds*, 568 U.S. 455, 466 (2013). “Merits questions may be considered to the extent — but only to the extent — that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.*

## ANALYSIS

The issue is whether the plaintiffs have proven that the proposed class is certifiable. The answer is no because the proposed class fails the commonality requirement. The plaintiffs identify questions of law or fact but have not demonstrated that they are common across the entire class and central to the validity of the claims. Based on the nature of the claims and the scope of the proposed class, the plaintiffs’ authorities in support of commonality are distinguishable.

Rule 23(a)(2) requires that “there [be] questions of law or fact common to the class.” “To satisfy Rule 23(a)(2) commonality, ‘even a single common question will do.’” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016) (cleaned up) (quoting *Wal-Mart*, 564 U.S. at 359). But “[w]hat matters to class certification is not the raising of common questions — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* (quoting *Wal-Mart*, 564 U.S. at 350). In other words, the claim must depend on a “common contention” that is capable of “classwide resolution,” meaning that its adjudication will “resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350.

### 1. Proposed Questions are not Common

First, the plaintiffs have not shown that many of the purported common questions apply to the entire class. The proposed class is all USF baseball players since 2000. Thus, the putative class includes hundreds of players and puts over two decades of conduct at issue.<sup>7</sup> Yet many of the purported common questions are fact-dependent and plausibly varied over time. While a single

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<sup>7</sup> Von Klemperrerr Decl. – ECF No. 266-41 at 7 (¶ 13); Selbin Decl. Ex. 17 – ECF No. 299-16; Selbin Decl. Ex. 18 – ECF No. 299-17; Selbin Decl. Ex. 19 – ECF No. 299-18.

1 common question will suffice, consideration of these failed questions illustrates some of the  
2 problems with the proposed class.

3 Take the proposed common questions for the plaintiffs' discrimination claims. Question six  
4 asks if any USF officials knew of the harassment. The plaintiffs identify numerous events that  
5 allegedly provided notice to USF, including complaints to administrators in 2000, 2013, 2014, and  
6 2021.<sup>8</sup> If the fact finder were to decide that the later complaints provided notice of harassment but  
7 that the 2000 complaint was insufficient — entirely possible as much of the alleged harassment  
8 had yet to occur — then the question is not capable of classwide resolution. Similarly, question  
9 one asks if USF had a policy of deliberate indifference to reports of sexual misconduct. Even  
10 under the plaintiffs' theory, USF's response to later complaints — internal investigations — was  
11 markedly different than its alleged response to the 2000 complaint: nothing.<sup>9</sup> Finally, the parties  
12 dispute whether USF's policies changed over the course of the class period, which could impact at  
13 least questions one, two, seven, and eight.<sup>10</sup> There is outstanding discovery on that topic and,  
14 though the plaintiffs may not be responsible for the delays, they *are* responsible for proving  
15 compliance with Rule 23(a).<sup>11</sup> They have not met their burden.

16 The retaliation questions fare no better. Question ten concerns whether protected activity was  
17 met with retaliation that resulted in a broader deterrent effect within the USF baseball team. All  
18 named plaintiffs identify instances of retaliation against them, but they have not shown that the  
19 resulting deterrent effect would apply to every USF baseball player since 2000.<sup>12</sup> Instead, the  
20 plaintiffs rely on Doe 8, who testified that players were scared to express their concerns.<sup>13</sup> But  
21 Doe 8 cannot testify as to whether that was true across the entire class period. Nor does players'

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24 <sup>8</sup> Mot. – ECF No. 265-3 at 17-20.

25 <sup>9</sup> *Id.* at 17, 19.

26 <sup>10</sup> USF Opp'n – ECF No. 282 at 9; Reply – ECF No. 299-2 at 28.

27 <sup>11</sup> Reply – ECF No. 299-2 at 27 (detailing outstanding discovery requests).

28 <sup>12</sup> Mot. – ECF No. 266 at 16 (listing alleged retaliatory acts).

<sup>13</sup> Doe 8 Dep. – ECF No. 266-20 at 8–9 (pp. 46:15–47:5).

1 reluctance to participate in a 2021 investigation establish that earlier class members were deterred  
2 by retaliation.<sup>14</sup>

3 Finally, the proposed negligence questions are problematic. Question fourteen asks whether  
4 USF was on notice of the risks posed by the coaches, or Giarratano on notice of the risks posed by  
5 Nakamura. As discussed above, USF's notice may have changed over the course of the twenty-  
6 plus-year class period. This, in turn, impacts question twelve, which asks whether the alleged  
7 misconduct was foreseeable. Similarly, question fifteen asks if USF's response was reasonable  
8 but, given the diverse complaints ranging from 2000 to 2021, the answer could vary over time.

## 9 10 **2. Proposed Questions are not Central to Validity of the Claims**

11 Second, any questions that are truly common do not resolve an issue that is central to the  
12 validity of each one of the claims in one stroke. *WalMart* is instructive. 564 U.S. at 349. There, the  
13 plaintiffs sought class certification based on the store's hiring and promotion practices. *Id.* at 346.  
14 But the Supreme Court cautioned that the existence of common questions like "[d]o all of us  
15 plaintiffs indeed work for Wal-Mart?" or "[d]o our managers have discretion over pay?" are  
16 insufficient to satisfy commonality. *Id.* at 349.

17 Here too, the plaintiffs raise questions that — though relevant — are not central to the validity  
18 of each claim. These include:

- 19 (4) Whether USF had substantial control over the coaches;
- 20 (9) Whether members of the USF baseball team engaged in protected activity;
- 21 (11) Whether a special relationship exists between USF and the USF baseball players or the
- 22 coaches and the coaches and the USF baseball players;
- 23 (13) Whether recognizing a duty as to USF or the coaches is consistent with public policy;
- 24 (16) Whether the coaches' conduct arose out of their employment; and
- 25 (17) Whether, as head coach, Giarratano was responsible for the conduct of his subordinates.

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28 <sup>14</sup> Ex. 10 to Selbin Decl., Email Correspondence dated Dec. 22, 2021 – ECF No. 265-10 at 5–6.

1 These are the types of common questions that, even if “raised in droves,” do not resolve a  
2 central issue such that a class action is justified because they do not indicate that the plaintiffs  
3 suffered the same injurious conduct. *See WalMart*, 564 U.S. at 349. Rather, these are threshold  
4 issues that do little to advance the plaintiffs’ overall claims.<sup>15</sup>

### 6 **3. The Plaintiffs’ Commonality Cases are Distinguishable**

7 In view of the above, it is unsurprising that the plaintiffs’ commonality cases are  
8 distinguishable because of differences in class scope and underlying legal theories.

9 Concerning their post-assault discrimination theory, the plaintiffs rely on *Rapuano v. Trustees*  
10 *of Dartmouth College*, 334 F.R.D. 637, 642 (D.N.H. 2020). In *Rapuano*, the plaintiffs brought a  
11 class action under Title IX stemming from sexual misconduct by three professors. *Id.* at 647. The  
12 court found that the proposed class satisfied the commonality requirement, albeit for preliminary  
13 settlement purposes, based on the common question of whether the professors’ harassment was  
14 severe, pervasive, and objectively offensive.<sup>16</sup> *Id.* The question was capable of classwide  
15 resolution because the plaintiffs demonstrated that every class member was subjected to a  
16 “baseline of equally egregious sexual harassment.” *Id.* at 648.

17 The same cannot be said here. In *Rapuano*, the class spanned just five years. *Id.* at 645. In this  
18 case, the proposed class spans over twenty years, and thus considerably greater proof is needed to  
19 establish that all class members experienced a baseline of equally egregious sexual conduct. And,  
20 unlike in *Rapuano*, where the university did not oppose certification for settlement, here, the  
21 underlying conduct is disputed. This highlights the possibility that some but not all putative class

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23 <sup>15</sup> Even if these questions were central to validity, the plaintiffs have not shown that a Rule 23(c)(4)  
24 class on such discrete issues (i.e., whether USF had a special relationship with the players) would  
25 “materially advance” the litigation. *Tasion*, 308 F.R.D. at 633. To the extent that threshold issues like  
26 existence of a duty are even disputed the court is not persuaded that an issue class is “superior to other  
27 available methods” like summary judgment or *Bellwether* trials. Fed. R. Civ. P. 23(b)(3). *Cf. Butler v.*  
28 *Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (a trial “limited to determining *liability* on a  
class-wide basis, with separate hearings to determine [] the damages of individual class members . . . is  
permitted by Rule 23(c)(4) and will often be a sensible way to proceed.” (emphasis added)).

<sup>16</sup> The *Rapuano* court noted that while Rule 23 is not more lenient in the settlement context, it would  
“apply the Rule 23 certification requirements [differently] because plaintiffs seek certification for the  
purposes of settlement only.”

members experienced severe, pervasive, and objectively offensive harassment. To date, the plaintiffs have not overcome that possibility because even the named plaintiffs allege various types of harassment.<sup>17</sup>

For their pre-assault theory, the plaintiffs cite *Karasek v. Regents of Univ. of Cal.*, 500 F. Supp. 3d 967, 985-86 (N.D. Cal. 2020) and *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007).<sup>18</sup> The cases do not involve class actions but illustrate the breadth of the plaintiffs' pre-assault theory. In *Karasek*, three students accused a university of having a culture of deliberate indifference to complaints of sexual harassment, creating a heightened risk of further harassment and ultimately causing separate assaults. 500 F. Supp. 3d at 970. This theory, premised on school-wide policies, was cognizable under Title IX. *Id.* at 977. In *Simpson*, two students argued that the school's deliberate indifference to complaints of sexual harassment ultimately led to their sexual assault by football recruits. 500 F.3d at 1172–73. The Tenth Circuit held that the plaintiffs' evidence — including complaints of misconduct and lack of policies — was sufficient to survive summary judgment. *Id.* at 1184.

This theory presents a closer question because the plaintiffs allege a uniform theory of harm — namely, that USF had a culture of deliberate indifference due to its complete lack of certain policies throughout the class period. But, as discussed above, the plaintiffs have not shown that USF's policies were the same throughout the class period, which is the topic of ongoing discovery.

For the commonality of their retaliation claims, the plaintiffs rely on *A. B. v. Haw. State Dep't of Educ.*, 30 F.4th 828, 841 (9th Cir. 2022). There, the plaintiffs alleged that school administrators retaliated against female water polo players whose parents complained of potential Title IX violations. The proposed injunction class was all current and future female students who participate, seek to participate, and/or were deterred from participating in athletics. *A. B. by C. B. v. Haw. State Dep't of Educ.*, 334 F.R.D. 600, 604 (D. Haw. 2019). The trial court found that the commonality requirement was not met because administrators specifically targeted the water polo

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<sup>17</sup> Mot. – ECF No. 265 at 9 (detailing various types of sexual misconduct).

<sup>18</sup> Mot. – ECF No. 266 at 24.

1 team whereas the class included all female athletes. But the Ninth Circuit reversed the decision  
2 because the plaintiffs presented evidence that all putative class members experienced the resulting  
3 deterrent effect. *A. B.*, 30 F.4th at 841.

4 By contrast, here, there is a failure of proof. In *A. B.*, the plaintiffs demonstrated that all class  
5 members experienced the deterrent effect of retaliation; by definition, the proposed class included  
6 students enrolled during or after the retaliatory act, who were thus subject to the deterrent effect.  
7 334 F.R.D. at 604; 30 F.4th at 841. Here, the plaintiffs allege various acts that may constitute  
8 retaliation including running players off the team, cutting scholarships, reducing playing time, or  
9 ostracizing and blackballing players.<sup>19</sup> It appears that some incidents were as early as 2000 while  
10 others were as late as 2021.<sup>20</sup> Due to the varied nature of the conduct, and the duration of the class,  
11 the plaintiffs have not shown that the issue can be resolved on a classwide basis. For example, a  
12 fact finder might decide that the earlier conduct was not retaliatory or did not result in a deterrent  
13 effect, but that later conduct was actionable retaliation. *See supra* Section 1.1.

14 Finally, for the commonality of their negligence claims, the plaintiffs cite *Hilario v. Allstate*  
15 *Ins. Co.*, 642 F. Supp. 3d 1048, 1060 (N.D. Cal. 2022). The *Hilario* plaintiffs were homeowners  
16 with insurance policies provided by Allstate. The plaintiffs alleged that Allstate double-counted  
17 the square-footage of their built-in garages, resulting in incorrect premiums. The court narrowed  
18 the proposed class to “[a]ll Allstate California homeowners’ insurance policyholders as of March  
19 2019, who paid premiums and had at least one built-in garage, and whose garage square footage  
20 was counted twice in calculating insured square footage and premiums.” *Id.* at 1058–59. The court  
21 found that this class satisfied the commonality requirement based on common questions including  
22 whether Allstate owed a duty of care to class members, and whether it breached that duty by how  
23 it calculated and charged premiums. *Id.* at 1060.

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27 <sup>19</sup> Mot. – ECF No. 266 at 16.

28 <sup>20</sup> Doe 9 Decl. – ECF No. 266-46 at 3 (¶ 9); Doe 2 Decl. – ECF No. 266-49 at 3 (¶ 8).

Here, the theory of breach is not so simple. The plaintiffs allege that USF was negligent in its supervision of the coaches and failed to take reasonable measures to prevent their misconduct.<sup>21</sup> As the plaintiffs acknowledge, breach may turn on what USF knew and when USF knew it.<sup>22</sup> The plaintiffs have not demonstrated that the answer is necessarily common throughout the twenty-plus-year class period. Conversely, in *Hilario*, breach was a common question because, for all class members, it turned on a single practice — Allstate’s double-counting error — and Allstate’s notice of that risk during May 2019. *Id.* at 1060.

### CONCLUSION

In sum, the plaintiffs have not met their burden to prove that the proposed class is certifiable. The motion is denied without prejudice.

**IT IS SO ORDERED.**

Dated: March 5, 2025




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LAUREL BEELER  
United States Magistrate Judge

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<sup>21</sup> Third Am. Compl. – ECF No. 133 at 109–111 (¶¶ 564–581).

<sup>22</sup> Mot. – ECF No. 266 at 26 (citing *Regents of Univ. of Cal. v. Super. Ct.*, 4 Cal. 5th 607, 619 (2018) (evidence that school was on notice of a risk may be relevant to breach because it informs the reasonableness of the school’s actions)).